

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Retention by Broadcasters of	)	MB Docket No. 04-232
Program Recordings	)	

To: The Commission

**JOINT COMMENTS OF NCE BROADCASTERS**

Alabama Educational Television Commission, Arizona Board of Regents for Benefit of the University of Arizona, Arkansas Educational Television Commission, Central Michigan University, Chicago City Colleges, Greater Dayton Public Television, Greater Washington Educational Telecommunications Association, Inc., Hampton Roads Educational Telecommunications Association, Iowa Public Broadcasting Board, KCTS Television, Kent State University, Kentucky Authority for Educational Television, Maine Public Broadcasting Corporation, Milwaukee Area Technical College, Mountain Lakes Public Telecommunications Council, Newark Public Radio, The Ohio State University, Ohio University, Prairie Public Broadcasting, Inc., Regents of the University of California, Regents of the University of Minnesota, Regents of the University of New Mexico and Board of Education of the City of Albuquerque, New Mexico, South Carolina Educational Television Commission, St. Louis Regional Educational and Public Television Commission, University of Houston System, University of Oklahoma, University of Wisconsin System, WAMC / Northeast Public Radio, and Wisconsin Educational Communications Board (collectively, the “NCE Broadcasters”), by their

counsel, provide these Comments in opposition to the proposals put forward by the Commission in the *Notice of Proposed Rule Making* in the above-captioned proceeding (“NPRM”).

The NPRM proposes to require broadcasters to make and retain recordings of their programming for purposes of enforcement of the FCC’s indecency policies. As the NCE Broadcasters show below, the proposed rules would impose significant costs on stations to achieve at best an miniscule gain in enforcement performance, subject broadcasters to mischievous and harassing behavior by complainants and, ultimately, tread on the First Amendment rights of broadcasters, particularly public broadcasters whose programming would likely become even more subject to “political” review at the Federal and state levels. Requiring the making and retention of program recordings is a bad idea. It should be rejected.<sup>1</sup>

#### The Proposal

The *NPRM* proposes to adopt program recording requirements applicable to all stations, including noncommercial educational radio and television stations, so as to improve the FCC's enforcement of its regulations prohibiting the broadcast of obscene, indecent or profane programming. The FCC notes that, now, a person complaining about an offensive broadcast is required to supply a transcript or tape of the offending program (or at least a significant excerpt). This may be a burden in some instances, and some complaints are therefore dismissed for lack of proof.

---

<sup>1</sup> Associations representing public television stations and public radio stations, the Association of Public Television Stations (“APTS”) and National Public Radio, Inc. (“NPR”), respectively, are filing separate comments in this proceed that oppose the Commission’s proposals, particularly as they apply to noncommercial educational television and radio stations. The NCE Broadcasters fully concur with the views of APTS and NPR as expressed therein.

The FCC believes it can improve its complaint process and better enforce indecency standards by requiring broadcasters to make and retain recordings of their broadcasts. The FCC reasons that, the more information it has about a program, the better decision it can make on issues of indecency. Therefore, the *NPRM* proposes that broadcasters make a recording of all material they air during the hours of 6 am and 10 pm, and retain these recordings for a period of 60 or 90 days.

The *NPRM* also suggests that programming recordings might be used by the FCC not only for enforcing its obscene-indecent-profane programming rules but also other rules such as its children's television commercial limits and sponsorship identification requirements. (Obviously, once recordings exist, they could also be used for any sort of programming requirements). In such an event, broadcasters might be required to record and retain the programming records for 24 hours a day rather than only for 18 hours a day.

#### Costs vs. Benefits of Proposed Rules

The NCE Broadcasters believe that the proposed rules would impose significant costs on stations, including specifically on noncommercial educational stations who are already struggling financially in these difficult times, to achieve at best a miniscule gain in enforcement performance. As a matter of public policy, the costs clearly outweigh the gains, strongly suggesting that the rules should not be adopted as proposed or, if they are adopted, they should not be applied to noncommercial educational radio and television stations.

The NCE Broadcasters have attempted to quantify the cost of complying with the proposed recording mandate. This has turned out to be very difficult, because (i) different possible technical solutions may be more or less appropriate given the technical configurations of particular stations or networks of stations, (ii) costs vary for radio and TV stations, (iii) it is

unclear whether programs, analog or digital, need to be recorded in the same quality (or bit rate) as they are broadcast, (iii) it is unclear how the recording requirements might apply to multiple transmitters located in various places in state or regional networks, particularly where there is some differentiation among the stations in terms of occasional local programming inserts or different interstitial materials, (iv) it has not been decided how the requirement applies to multiple DTV program streams, and (v) the length of time that recordings need to be retained (and thus the storage capacity required) is still unknown. Thus, cost estimates vary widely, from a low figure for equipment and staff time to manage the recording process of about \$5,000 per station to a high (in the case of a licensee of multiple stations in multiple locations who, based on staffing issues, would need to automate the process), of several hundred thousand dollars. Commonly, it is estimated that the cost of equipment per video program stream (analog or video) to record for 90 days, not including staff costs, would be in the \$5,000 to \$10,000 range. For many noncommercial educational broadcasters, from college radio stations whose annual budgets are not much larger than these costs, to public television stations and networks who have experienced multiple budget cuts and staff layoffs over the past several years while trying to meet Commission demands for DTV construction and activation, these costs will greatly exacerbate stations' existing financial difficulties. Over hundreds of stations and thousands of analog and digital streams nationwide, the equipment costs alone that would be imposed on noncommercial educational broadcasters would be in the tens of millions of dollars, a cost which the system can hardly afford.

These costs are only the beginning, however. Depending on how the FCC requires broadcasters to handle requests for viewing or making copies of program recordings, the staffing needs associated with the proposed rules could escalate costs dramatically. This concern is

discussed in more detail below, but if the FCC were to require broadcasters to ferret out programs subject to numerous undocumented complaints, and arrange either for viewing at the station or for the provision of copies to complainants and/or the FCC, the staff burden on broadcasters going forward could be considerable.

In contrast to the significant costs involved, the regulatory gain is close to non-existent. The Commission itself in the *NPRM*, at note 8, states that in the three-year period 2000-2003, the FCC received 14,379 indecency complaints, and it denied or dismissed only 169 complaints (a miniscule 1.2%) for lack of a tape, transcript or significant excerpt. These statistics utterly belie the need for any action in this area – the Commission was able, in about 99% of cases, to resolve indecency complaints without any program recording and retention requirements. Where, then, is the regulatory need to compel broadcasters involuntarily to incur the costs to record and retain copies of their programs?

It would likely be telling, if information on the 169 undocumented complaints were available, the nature of the stations against whom these complaints were filed. The NCE Broadcasters believe that noncommercial educational stations are far less likely to be subject to complaints for indecent broadcasts, and very, very few cases of indecency by these stations have ever been adjudicated (none, to our knowledge, against NCE television stations). Thus, at the very least, the FCC should refrain from imposing the costs of compliance with these proposed rules on noncommercial educational broadcasters or, more generally, on broadcasters who have not been found to have aired indecent programming in the past.

#### Potential for Abuse of Proposed Rules

While a very rare indecency complaint may be denied or dismissed because no one can show exactly what was said or depicted, having an enforcement policy and program recording

and retention rules that permit anyone to complain about the content of any program, however flimsy and undocumented the complaint, and then routinely require the broadcaster to dig out a tape or create a transcript of the offending program, can and will result in abuse of the complaint process. If the guaranteed existence of program recordings permits a listener or viewer to say " I think I heard someone say something offensive on station such and such, and I'm not sure exactly what was said, but I was sure offended by it," and the FCC finds that complaint to be sufficient to require the station to go look for what was purportedly said, provide the tape or transcript to the FCC and/or the complainant, then defend it, an unrealistic, unnecessary and onerous burden will be placed on stations.

The Commission has already effectively adjusted the burden of proof in indecency complaints to favor the complainant, by permitting the complainant to provide a relatively limited description of the supposedly offending program. The proposed rules would enable the burden of proof to be shifted entirely to the broadcaster, thereby creating a perfect environment for harassment of stations that carry programming thought by one or another social, religious or political group to be offensive, or by others who are otherwise disgruntled with particular stations.

#### First Amendment Concerns

The NCE Broadcasters believe that the FCC's proposal raises serious First Amendment concerns because of its chilling effect on free speech. One concern of course is that copying and retention rules will have the direct effect of the suppression of programming that might be controversial or challenging and therefore might generate listener or viewer complaints to the FCC, thus triggering the burden on stations to locate and supply copies of programs and defend them. However, the rules would also have the indirect, but perhaps more insidious, effect of

facilitating “political correctness” surveys of the NCE Broadcasters’ overall program services by local, state or federal officials.

In *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978), the Court of Appeals for the District of Columbia Circuit struck down a public broadcasting program recording requirement imposed by Congress in 1973, the thinly-disguised purpose of which was to facilitate oversight by Congress and other public officials of program content on noncommercial educational stations. The APTS comments and the NPR comments, both filed concurrently in this proceeding, contain analyses of the First Amendment considerations applicable to the Commission’s current proposal and conclude that, under the standards of the *Community-Service Broadcasting* case and other pertinent Constitutional analysis, the proposed rules would be in violation of the First Amendment. The NCE Broadcasters find these arguments persuasive, and urge the Commission to heed the serious Constitutional issues raised by its proposal.

#### Copyright Issues

The NPRM inquires whether copying and retention requirements might implicate the rights of third parties, including holders of copyright or contractual rights in programs. The making of one or more copies of radio and/or television programs, and their distribution to others, come within the bundle of exclusive rights held by copyright holders who, quite often in noncommercial educational broadcasting, are parties other than the broadcast licensee itself. Some contracts by which stations obtain programs from other third parties may also prohibit, or at least not authorize, copying and distribution.

It is an open question whether copying and distribution of copyrighted materials in an administrative enforcement context is exempt under “fair use” concepts. It appears that a

defense has been recognized in the context of reproduction of copyrighted materials for judicial proceedings, but that defense has not been extended to administrative proceedings.<sup>2</sup> The FCC should consider the implications of the current state of copyright law and the fair use defense before it adopts mandatory recording and retention requirements.

### Conclusion

For the foregoing reasons, the NCE Broadcasters urge the FCC not to adopt the proposal to require broadcasters to make and retain recordings of their programs. In the event that the Commission determines to proceed in the face of the substantial costs of the rules, the serious lack of public interest justification for them, and the Constitutional concerns they raise, the rules should be restricted to the core indecency enforcement process and not expanded to cover other programming issues, access to copies of programs should be limited to the Commission, complainants should still be required to articulate and document colorable indecency allegations before stations are put to the burden of researching and providing copies of programs, and stations should, in the absence of prior adjudications of indecent programming, be exempt from the requirements.

---

<sup>2</sup> MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[D][2] (2004).



Respectfully submitted,

ALABAMA EDUCATIONAL TELEVISION  
COMMISSION

ARIZONA BOARD OF REGENTS FOR  
BENEFIT OF THE UNIVERSITY OF ARIZONA

ARKANSAS EDUCATIONAL TELEVISION  
COMMISSION

CENTRAL MICHIGAN UNIVERSITY

CHICAGO CITY COLLEGES

GREATER DAYTON PUBLIC TELEVISION

GREATER WASHINGTON EDUCATIONAL  
TELECOMMUNICATIONS ASSOCIATION,  
INC.

HAMPTON ROADS EDUCATIONAL  
TELECOMMUNICATIONS ASSOCIATION

IOWA PUBLIC BROADCASTING BOARD

KCTS TELEVISION

KENT STATE UNIVERSITY

KENTUCKY AUTHORITY FOR  
EDUCATIONAL TELEVISION

MAINE PUBLIC BROADCASTING  
CORPORATION

MILWAUKEE AREA TECHNICAL COLLEGE

MOUNTAIN LAKES PUBLIC  
TELECOMMUNICATIONS COUNCIL

NEWARK PUBLIC RADIO

THE OHIO STATE UNIVERSITY

OHIO UNIVERSITY

PRAIRIE PUBLIC BROADCASTING, INC.

REGENTS OF THE UNIVERSITY OF  
CALIFORNIA

REGENTS OF THE UNIVERSITY OF  
MINNESOTA

REGENTS OF THE UNIVERSITY OF NEW  
MEXICO AND BOARD OF EDUCATION OF  
THE CITY OF ALBUQUERQUE, NEW MEXICO

SOUTH CAROLINA EDUCATIONAL  
TELEVISION COMMISSION

ST. LOUIS REGIONAL EDUCATIONAL AND  
PUBLIC TELEVISION COMMISSION

UNIVERSITY OF HOUSTON SYSTEM

UNIVERSITY OF OKLAHOMA

UNIVERSITY OF WISCONSIN SYSTEM

WAMC / NORTHEAST PUBLIC RADIO

WISCONSIN EDUCATIONAL  
COMMUNICATIONS BOARD

By:           /s/ Todd D. Gray          

Todd D. Gray  
Margaret L. Miller  
Their Attorneys

DOW, LOHNES & ALBERTSON, pllc  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036-6802

(202) 776-2571

August 27, 2004